Cartels

Enforcement, Appeals and Damages Actions

2019

Contributing Editors:
Nigel Parr & Euan Burrows

glg global legal group

CONTENTS

Switzerland

Michael Tschudin, Frank Scherrer & Urs Weber-Stecher
Wenger & Vieli Ltd.

Overview of the law and enforcement regime relating to cartels

The Authorities

The Swiss Competition Authorities, comprised of the Competition Commission ("ComCo") and its Secretariat ("Secretariat") are responsible for the public enforcement of the Swiss Cartel Act of 1995 ("CartA"). The 12 members of the ComCo meet on a regular basis to decide cases, while the Secretariat conducts the investigations and submits proposals to the ComCo for determination. The ComCo consists of a majority of independent experts, such as professors of law and economics, and a minority of stakeholders, including industry and trade union representatives. There are approximately 58 lawyers and economists within the Secretariat, which is divided into four, equally sized divisions: infrastructure; services; product markets; and construction.

Typically, the Competition Authorities investigate complaints reported by businesses or consumers and leniency applicants. Cases that would be likely to have a substantial impact on the Swiss economy, such as market foreclosure by restrictions on parallel trade, are more likely to be prioritised for investigation. Cartels that do not substantially restrict competition are not subject to financial sanctions in Switzerland and complaints by concerned parties regarding such cartels are increasingly referred to civil redress by the Competition Authorities.

Enforcement Priorities

The enforcement priorities of the Competition Authorities consist of fighting hard core horizontal cartels and vertical agreements involving foreclosure of the Swiss market. Such vertical agreements are of particular interest to the ComCo, in cases where parallel imports from the EU into the Swiss market are potentially restricted. For example, agreements between parties within the European Economic Area (EEA) restricting passive sales outside of the EEA have been considered illegal from a Swiss perspective, since imports into Switzerland – not being part of the EEA – were affected by such agreements (see section below on "*Overview of cartel enforcement activity during the last 12 months*"). However, companies outside of the EEA may also be investigated. For example, recently an agreement between an Australian producer and a Swiss main importer of flash lights has been investigated. A Swiss competitor had tried to source this product through a Polish main importer, and was unsuccessful, because the Australian producer would not supply the Polish importer, after an intervention by the Swiss main importer.

Fines and Criminal Sanctions

The CartA distinguishes administrative sanctions from criminal sanctions. Criminal

sanctions for individuals are very rare and only apply to those who wilfully violate an amicable settlement or a final and non-appealable decision (including rulings regarding the obligation to provide information). Administrative fines against firms may amount up to 10 per cent of the turnover that the firm achieved in Switzerland in the preceding three financial years. According to the Federal Supreme Court, such administrative sanctions have the characteristics of criminal sanctions. Therefore, the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) apply in principle, however not in full.

Not all kinds of cartels are subject to fines. On the horizontal level, only hard core cartels regarding price-fixing, volumes, allocation of customers and territories may directly result in a fine. Regarding vertical restrictions, resell price maintenance and absolute allocation of a geographical market, to the extent that passive sales by other distributors into such territories are not permitted, may be fined. Other restrictions, such as vertical online sales restrictions, may be found illegal, but only fined where the undertaking involved violates the corresponding decision of the authority.

Overview of investigative powers in Switzerland

Proceedings under the CartA are generally in two stages. The Secretariat can initiate preliminary investigations on its own initiative, at the request of certain affected undertakings (e.g. competitors), or based on third party complaints. It is at the discretion of the Secretariat whether to open a preliminary investigation. If the Secretariat finds indications of a significant restriction of competition, it requests the opening of an investigation by a presidium member of the ComCo. Also, dawn raids and seizures of documents and electronic data first require an investigation to have been opened, as these coercive measures are not possible in preliminary proceedings.

In principle, the Secretariat may not decide on any procedural orders without the consent of a presidium member of the ComCo. Generally, once official investigations are opened, they are seldom closed without any consequences for the undertakings involved.

The scope of the investigative powers depends on whether or not the party involved is subject to an administrative sanction. If so, the right against self-incrimination (*nemo tenetur* principle) limits the investigative powers to a certain extent. If such sanctions do not apply, the investigative procedure is merely administrative. Such procedures are characterised by a certain duty of cooperation according to Swiss administrative law.

For example, upon specific request for information, the undertakings under investigation are obliged to provide the Secretariat with all information required for the investigation and to produce necessary documents (article 40 CartA). In case the Competition Authorities investigate a hard core cartel – which is subject to a fine – an undertaking may refuse to cooperate in relation to a request for information, to the extent that by cooperating the undertaking could incriminate itself. The same principle applies in relation to interviews with individuals (within the executive bodies) which speak for the undertaking.

Upon request of the Secretariat, a presidium member of the ComCo may order dawn raids and seizures (see article 42 para. 2 CartA). The Secretariat published a note on selected instruments of investigation in January 2016. Therein, it laid out its best practice particularly with regard to inspections and the seizure of documents and electronic data. The representatives of the Secretariat in charge of the inspection will, *inter alia*, not wait for the arrival of external lawyers before starting to search the premises. Any evidence discovered while the external lawyers were not present will, however, be set aside and only be screened

once the lawyers are present. If deemed necessary, the undertaking being raided may request the sealing of specific or even all documents and electronic data.

The Swiss Competition Authorities may communicate with the EU Authorities based on the agreement between Switzerland and the EU on cooperation and exchange of information between their respective competition authorities. This agreement allows them to mutually exchange specific case-related confidential information. The scope of this information exchange agreement is broader than in previous EU cooperation agreements with non EU-Member States and is therefore called a "Second Generation Agreement" in the EU. The crucial point in this new generation of agreements is that confidential information can be transmitted without the parties' consent. Nevertheless, the agreement provides for limitations on the exchange of information and the use of it. For instance, only information already in the possession of the authority may be requested by the other authority, and information received under a leniency or settlement procedure must not be transmitted.

Overview of cartel enforcement activity during the last 12 months

While the ComCo conducted around 30 investigations in the last 12 months, three decisions have been taken during this period which concerned cartels. Generally, the enforcement level slightly increased compared to previous years. As in other jurisdictions, the enforcement activity highly depends on the number of staff within the Competition Authorities, whereas this number has not increased in the year under review. Whereas in the past the detailed effects analysis had bound significant resources, the effects of cartels play a subordinate role now based on new case law of the Federal Supreme Court. These cases resulted in two main effects: firstly, the investigations are shorter since less economics is involved when considering hard core cartels. Secondly, the Competition Authorities seem more courageous or rather more aggressive in their investigative work. Therefore, we believe that the trend in Switzerland is clear: the level of enforcement has been raised and there is less room for pragmatic solutions.

Whereas the Secretariat especially focuses on bid rigging cases in the building sector, no business sector is excluded from competition law scrutiny. The three dawn raids in 2018 demonstrate this point: one dawn raid was carried out in February 2018 on several general contractors in the energy business in the region of Geneva. The Secretariat conducted another dawn raid in relation to an association of driving instructors. The most recent dawn raid in 2018 was carried out against several companies in the financial industry on the suspicion of a coordinated boycott of Apple Pay.

The ComCo has taken the following three decisions in the last 12 months concerning cartels. In January 2018, the ComCo decided on a partnership agreement between two wholesalers of engine fuel for certain machines, such as lawnmowers or chainsaws. The cartel concerned the resale price and customer allocation. The investigation was opened after a self-denunciation by one of the parties. The other party, which had subsequently filed a self-denunciation as well, was fined approximately USD 600,000.

In April 2018, the ComCo fined the German RIMOWA GmbH, with its registered office in Cologne, with approximately USD 130,000, for export restrictions outside the EU and the EEA, in its agreements with German distributors. Since Switzerland is not part of either the EU nor the EEA, the export restrictions concerned Switzerland as well. This case was started by complaints from various Swiss customers. The calculation of the fine is noteworthy, because the ComCo granted a discount for the willingness of RIMOWA GmbH to settle and additionally for its cooperation in the case, which resulted in a total discount of 40 per cent

on the original proposed fine (see also the section below on "*Administrative settlement of cases*").

Also, in April 2018 the ComCo fined serval undertakings in a big rigging case of approximately USD 7.5 million. This case is part of a series of cases concerning the Swiss mountainous canton of Grisons. The cartels concerned public and private procurement in building construction and civil engineering. The decision has not been published yet and may be appealed to the Federal Administrative Court. Another case related to bid rigging in Grisons will most probably be decided in 2019.

Key issues in relation to enforcement policy

The enforcement policy of the Swiss Authorities is strongly based on EU competition law. In particular, in relation to vertical restrictions, the Swiss Authorities heavily rely on the corresponding block exception rules and the guidelines of the EU. Accordingly, the ComCo has stated in its guidelines on vertical restrictions that vertical agreements, which are legal according to EU competition law generally, are legal according to Swiss law. The ComCo wishes to avoid a *Swiss finish* – i.e. an additional review according to Swiss law of international distribution systems which are in line with EU competition law.

That being said, the EU rules and guidelines do not, of course directly apply in Switzerland, and the ComCo reserves the right to deviate from EU standards to the extent that the specifics of the Swiss market require a specific analysis. Therefore, while undertakings may profit from some degree of guidance from the EU competition law, reliable safe harbours only exist to a very limited extent in Switzerland. Consequently, the degree of legal certainty is smaller than in the EU.

Key issues in relation to investigation and decision-making procedures

There is some controversy in Switzerland around the ComCo's decision-making process as the two bodies, the ComCo and the Secretariat, are not separate. As already noted, the ComCo must approve the opening of an investigation, and, to conduct a dawn raid and seize documents and electronic data, the consent of a presidium member of the ComCo is required.

The ComCo announces the opening of an investigation by means of an official publication. This announcement must state the purpose of the investigation and the names of the parties involved. All parties subject to the investigation are vested with the usual administrative procedural rights, unless the CartA stipulates otherwise (article 39 CartA). They particularly have the right to consult and comment on the case files and to suggest witness hearings, and they have the right to be heard and to participate in oral party and witness hearings. On the basis of the investigation, the Secretariat issues a draft decision, which is comparable to the statement of objections in the EU. The parties may comment on such draft decision.

The ComCo and the appellate courts are not obliged to reach a final decision within a specified period of time. The question of whether statutory time bars apply is controversial and currently subject to an appeal before the Federal Administrative Court. In ComCo's view, no statutory time bars exist except that no direct fines can be imposed if an investigation was opened later than five years after the restriction of competition had ceased (article 49a para. 3 letter b CartA).

In certain specific circumstances, procedural decisions (interim decisions) may be appealed even before a final decision on the merits has been taken. This may generally be the case regarding an order to produce specific documents or compulsory interviews with individuals.

Procedural rights against dawn raids are very limited. Consequently, dawn raids by the Competition Authorities have not been successfully challenged in court.

As a result of the Menarini decision of the European Court of Justice on 27 September 2011, the Swiss courts have held that the guarantees of the ECHR may be met by the appeal proceeding of the Federal Administrative Court. It should be noted that the Federal Administrative Court covers a broad field of administrative law and the administrative judges generally tend to support the administration. While the Federal Administrative Court following the guarantees of the ECHR has to examine the facts of a case point by point, it often gives leeway to the ComCo in relation to legal and economic issues.

Leniency/amnesty regime

In Switzerland many cartel investigations are started by a leniency application. In the first 10 years after the leniency regime came into force, the Competition Authorities had received about 50 leniency applications. In general, the ComCo and the Secretariat are considered to be fair and proportionate with regard to the obligations imposed on a leniency applicant, such as the obligation to fully cooperate with the authorities during the investigation.

Pursuant to article 8 para. 1 of the Ordinance on Sanctions imposed for Unlawful Restraints of Competition ("CASO"), the ComCo grants immunity from a fine if an undertaking is the first to either: (i) provide sufficient information enabling the ComCo to open an investigation that the ComCo itself did not have at the time of the leniency filing; or (ii) submit evidence enabling the ComCo to prove a hard core cartel, provided that no other undertaking has already been considered the first leniency applicant.

Immunity from a fine will not be granted if the undertaking: (i) coerced any other undertaking to participate in the infringement and was the ring leader; (ii) does not voluntarily submit to the ComCo all information or evidence in its possession concerning the illegal anti-competitive practice in question; (iii) does not continuously cooperate with the ComCo throughout the investigation without restrictions or delay; or (iv) does not cease its participation in the infringement voluntarily or upon being ordered to do so by the competition authorities.

Pursuant to the CartA, full immunity is limited to the "first in". As outlined above, full immunity from a fine is also possible for cooperation that enables the ComCo to prove an infringement and therefore also when an investigation has already been opened and a dawn raid conducted. As soon as an undertaking becomes aware of an investigation having been opened and/or a dawn raid has been conducted, it needs to decide immediately whether or not to cooperate with the Competition Authorities. If the intention is to cooperate, it should submit a leniency marker or application to the ComCo without delay (in writing such as by e-mail or orally by protocol declaration).

Going in second or later in the same investigation will only allow for partial immunity. A reduction of up to 50 per cent is available at any time in the proceeding to undertakings that do not qualify for full immunity.

A leniency application may include information, which allows the ComCo to investigate further infringements (*leniency-plus*). The maximum discount in fines for such a leniency-plus application is 80 per cent. A party in a case regarding building hardware for windows, decided in 2010, benefitted from a reduction of 60 per cent in the original proceedings and of 100 per cent in the subsequent investigation, which concerned building hardware for doors. The latter case concerned five wholesalers who agreed on minimum margins for products from a specific producer.

Another cartel case following a leniency application concerned a vertical restriction on parallel trade. General Electric Company, USA, and GE Healthcare GmbH, Germany, applied for leniency in relation to restrictions in distribution agreements in Germany with third parties regarding active and passive sales into Switzerland, where GE distributed its products directly to end consumers through an affiliate. After a relatively short investigation, the parties agreed to an amicable settlement in 2016, which was accepted by the ComCo in the same year. No fine was paid because the applicants were granted a reduction of 100 per cent. This is remarkable, because a complete reduction requires the applicant to have not coerced any other undertaking into participating in the infringement of competition, nor played the leading role in such behaviour. Unfortunately, the published decision does not provide any reasoning for this aspect of the decision. It seems surprising that the producer in a common vertical relationship restricting exports of distributors had apparently no leading role; after all, this restriction of sales was beneficial to GE's subsidiary in Switzerland. However, this case demonstrates that – apart from horizontal cartels – undertakings involved in vertical restrictions may, in principle, be rewarded with partial or even full leniency.

Administrative settlement of cases

Under Article 29 of the CartA, the Secretariat may propose an amicable settlement on ways to eliminate the restraint to competition by the undertakings involved. The Secretariat regularly proposes such settlements, which must be approved by the ComCo. By using settlements, which include commitments of the undertakings involved regarding their future conduct, a direct and often immediate effect on the relevant market can be accomplished. Settlements can also lower the risk of an appeal and consequently avoid costly and time-consuming procedures before the Federal Administrative Court and subsequently the Federal Supreme Court. In addition, companies which accept an amicable settlement may benefit from a discount of generally up to 20 per cent of a potential fine. Thus, settlements are generally appealing to all parties. However, fewer appeals mean that for practitioners there is less judicial guidance from case law.

In its annual press conference of 17 April 2018, the ComCo emphasised the importance of administrative settlements. It highlighted in particular the cost saving aspects and the positive effects on the reputation of undertakings which agree to such settlements.

On 28 February 2018, the Secretariat published a new guidance paper on amicable settlements. The guidance clarifies that the discount for such settlements depends, amongst other things, on the timing. Whereas a settlement in the early state of proceedings may result in a discount of up to 20 per cent, the discount is generally reduced if the settlement is agreed at a later state in the proceedings. Where a settlement is agreed to by an undertaking after the Secretariat has issued a draft decision, the discount may amount to as little as 5 per cent. The discount for an amicable settlement is not exclusive and may be combined with other discounts, such as leniency discounts and discounts for good cooperation with the authorities. In the latter case the combined discount for an early state settlement of 20 per cent may be combined with a discount of another 20 per cent for good cooperation, a total discount of 40 per cent, which is not much less than the potential discount to a second leniency applicant, which may be up to 50 per cent.

Third party complaints

Anyone may file a complaint with the Secretariat (article 26 CartA). According to the official annual report of the ComCo, the Secretariat conducted 63 (informal) so-called market

observations and 635 enquiries. Only very few of such matters were followed up by the Secretariat. Certain enquiries from companies, which are targeted against another company, are referred to civil enforcement by the Secretariat. However, this cannot hide the fact that a carefully drafted third party complaint is generally taken seriously by the Secretariat. So, a third party complaint may be the starting point of a detailed investigation particularly if convincing evidence is provided by the third party.

No party is entitled to have an investigation opened by the Competition Authorities and therefore may not appeal a refusal to do so. A third party may bring a civil court action based on competition law, although such case law has not yet been developed much in Switzerland (see section below on "*Developments in private enforcement of antitrust laws*").

There is the possibility for affected third parties to join the investigation procedure. Where they qualify as a party, they have full legal standing and are vested with all procedural rights. However, under the Federal Supreme Court's practice, third parties do not easily qualify as a party. Particularly with regard to competitors, in addition to a close proximity to the subject matter, they are required to suffer a clear economic disadvantage. Such disadvantage requires a specific and individual affectedness and is considered as given if an illegal anti-competitive agreement has disadvantageous effects on the competitor, in particular diminished turnover. The requirements for full legal standing have to be clearly established by the competitor claiming to be a party.

Civil penalties and sanctions

The amount of the fine depends on the duration and severity of the unlawful conduct. The turnover of the undertakings is calculated by application of the rules on the calculation of turnover in merger control cases (article 4 and 5 of the Merger Control Ordinance; "MCO") and includes the consolidated net turnover (excl. intra-group turnover). The base amount is up to 10 per cent of the consolidated net turnover generated on the relevant markets in Switzerland cumulatively in the preceding three business years before the illegal conduct has ended, depending on the type and severity of the violation (article 3 CASO). Turnover of the undertaking abroad is not taken into account. The turnover relevant for the base amount of the fine is calculated by application of the rules of the MCO. In recent price-fixing cases, absent specific circumstances, the ComCo applied a percentage of between 5 and 10 per cent for the base amount. The base amount will then be increased by up to 50 per cent if the violation was implemented for up to five years. Each additional year thereafter will lead to an increase of another 10 per cent.

This interim base amount may increase by a certain percentage to reflect aggravating factors, such as repetition of an infringement, high cartel gains, ring-leading and measures to enforce cartel discipline (article 5 CASO). This is not exhaustive and other factors may be taken into account too: Swiss law provides the ComCo with wide discretion.

For calculating the fine, mitigating factors also have to be taken into account and the amount of the fine may be reduced accordingly. Examples of mitigating factors are: termination of the illegal conduct before or immediately after the ComCo has taken first steps; passive role in the cartel; or desisting from taking cartel enforcement measures. In recent cases, the reduction percentages have varied from 10 to 60 per cent depending on whether the companies fully collaborated, immediately ceased their unlawful practices, or concluded an amicable settlement.

In exceptional cases, the ComCo may also impose a lump sum or symbolic fines – this has been the case in the presence of rather small turnovers.

Right of appeal against civil liability and penalties

The decisions of the ComCo may be appealed at the Federal Administrative Court. Such appeals constitute full merits appeals on both the findings of facts and law. While administrative judges generally tend to support the administration, the Federal Administrative Court does not hesitate to annul ComCo's decisions in full, if required. In our experience, the Federal Administrative Court's judicial review of a case is more detailed in relation to hard facts as opposed to economic evidence, where the Court tends often to show reluctance to fully review ComCo's arguments. It is noteworthy that the appeals committee, which was competent for competition law appeals before 2007, had economists who were closely involved in the judicial review. Unfortunately, the Federal Administrative Court currently lacks economists sitting on the bench.

Since many legal questions have not been answered in Swiss competition law by the competent courts, most decisions (excluding settlement cases) are appealed. In particular, the calculation of the fine – similar to the EU – is reviewed in detail by the courts, which often results in smaller fines for the undertakings involved in cartel cases.

The judgments of the Federal Administrative Court may be challenged in the Federal Supreme Court. In proceedings before the Federal Supreme Court, judicial review is limited to legal claims, i.e. the flawed application of the CartA or a violation of fundamental rights set forth in the Swiss Federal Constitution or in international law. In the last few years, the Federal Supreme Court has greatly tightened the CartA with its interpretation of the law. In certain cases, the legal reasoning was even more enforcement-driven than the ComCo's position.

Numerous competition law cases are currently pending before the two appellate courts. Some of these cases raise fundamental questions, such as the questions of whether, and if so, what statutory time bars apply for public enforcement proceedings and what requirements must be proven to find an illegal single overall infringement.

Criminal sanctions

The CartA distinguishes administrative sanctions from criminal sanctions. Criminal sanctions for individuals are very rare and only apply to those who wilfully violate an amicable settlement or a final and non-appealable decision (including rulings regarding the obligation to provide information).

Administrative sanctions are not viewed as criminal sanctions in the strict sense. However, the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) regarding criminal charges apply in principle.

Cross-border issues

Application of Swiss competition law on foreign behaviour

As in other jurisdictions, Swiss competition law is applicable irrespective of whether or not the infringement has taken place in Switzerland. Decisive for the application of the CartA is whether a certain behaviour may have an effect in Switzerland. According to recent case law of the Federal Supreme Court, it is not necessary for there to be an actual effect, or a particular intensity of the effect. It is sufficient that the behaviour may potentially have an effect on the Swiss market. This broad interpretation deviates from international standards and may lead to surprising results. For example, clauses in contracts between foreign parties which have potential effects on the Swiss markets (for example, restrictions to export) are

sufficient for a sanction in Switzerland. This holds true even if such exports to Switzerland do not occur anyway – i.e. also without a restriction – and therefore have not even been contemplated by the parties when drafting the agreement. In other words, actual effects no longer play a role when analysing the applicability of the CartA. This is particularly problematic in relation to hard core cartels, since the negative effects of such cartels are presumed by the CartA and, therefore, the ComCo does not need to prove such actual effects when deciding a fine.

Cooperation agreements

Following the agreement between Switzerland and the EU on cooperation and exchange of information between their respective competition authorities, which entered into force on 1 December 2014 (see also the section above on "*Overview of investigative powers in Switzerland*"), Switzerland has started bilateral talks with Germany in relation to cooperation between their respective competition authorities. Germany is the most important trading partner for Switzerland. In addition, according to the ComCo, Germany constitutes an important market for reference for Switzerland, in particular, regarding price comparisons.

Developments in private enforcement of antitrust laws

Competition law in Switzerland is (to date) to a large extent driven by public enforcement. Private enforcement has not reached its full potential and in particular has not reached the level which the legislator originally hoped for. There are several procedural and substantive reasons for this. Compared to other jurisdictions it has not been attractive for plaintiffs to enforce competition law claims in a civil court.

We believe that the modest development in private enforcement in Switzerland is based mainly on two elements: firstly, companies in Switzerland consider competition law predominantly as a compliance issue. The potential of competition law to protect a company's interest, in particular against dominant firms, is generally underestimated. Secondly, the amount of recent case law regarding private enforcement is relatively low.

In the year under review there has been certain private litigation in the car distribution industry, for which the ComCo issued specific guidelines. In addition, the trend towards follow-on claims will most probably gain in importance in Switzerland in the near future. Specifically, the recent bid rigging cases could result in such follow-on claims brought forward by public procurement authorities.

Reform proposals

After the failed attempt to reform the CartA in 2014, several proposals have been put forward to reform certain specific elements in the CartA. The main current reform proposal in Swiss competition law relates to the controversial topic on how to fight Switzerland's status as the so-called "Island of High Prices" in Europe. In 2016, the people's initiative regarding "fair prices" was launched. By January 2018, the initiative committee had collected enough signatures to bring the initiative to a public vote. The initiative aims at introducing new regulation with regard to abuses by undertakings with "relative market power". A similar concept as already exists in German competition law. Under the people's initiative, and subject to legitimate business reasons, undertakings would abuse their relative market power if they either refuse to contract with Swiss domestic customers willing to purchase products abroad to the corresponding foreign conditions, or charge a "Swiss surcharge" on the foreign market prices. However, as the initiative is drafted, all obligations which apply to dominant

undertakings would apply also to undertakings with "relative market power". Therefore, loyalty rebates of a supplier would be found illegal even if an undertaking is not dominant generally, but has market power in relation to a single customer, which for whatever reason relies on the products of the supplier. The Swiss Government has communicated a counterproposal in August 2018 limiting the scope of the concept of "relative market power" to the obligation to supply at foreign market prices. The Government will bring the initiative and its counterproposal to parliament in summer 2019.

Another more sector-specific reform proposal concerns online travel agencies. In October 2015, the ComCo prohibited several booking platforms the use of "wide" hotel rate parity clauses in their agreement with hotels. These clauses provided that hotels were not allowed to offer lower prices or larger quantities of rooms on, *inter alia*, other booking platforms. However, due to a lack of significant empirical value, the ComCo decided not to prohibit "narrow" hotel rate parity clauses, which solely prevented hotels from offering lower rates on their own websites as compared to the booking platforms. Instead, the ComCo wanted to monitor the effects of such clauses on the markets. However, a Motion by MP Bischof of 30 September 2016 to "*Prohibit Adhesion Contracts from Online Booking Platforms against Hotels*" aimed at prohibiting any kind of parity clauses in agreements between online booking platforms and hotels, i.e. including "narrow" hotel rate parity clauses. The Swiss parliament adopted the motion with a large majority. It is now up to the Swiss government to prepare a legislative proposal.

Finally, the Government is currently developing a proposal to reform Swiss merger control. Essentially, the Government intends to replace the current dominance test in merger control with the internationally standard SIEC test. This proposal had been included in the failed reform 2014, and the merger control element has not been disputed in parliament. Consequently, it is highly likely that a specific reform regarding merger control will be introduced in the next few years.

Michael Tschudin
Tel: +41 58 958 53 36 / Email: m.tschudin@wengervieli.ch

Michael Tschudin is specialised in Swiss and European competition law, regulated markets, related compliance programmes and litigation. Having worked at the Competition Commission (2005–2006) and the court of appeal for competition law cases, the Swiss Federal Administrative Court (2013–2014), he is able to draw on this practical experience when advising clients. Michael Tschudin had previously worked as an attorney at Wenger & Vieli AG from 2010 until 2012 before re-joining the firm in 2015. Since completing his PhD in competition law, he has regularly published articles on related issues. He focuses particularly on economic principles and in 2014 he obtained a postgraduate diploma in 'Economics for Competition Law' from King's College, London. Michael Tschudin is ranked by *Chambers* as an associate to watch and by *Who's Who Legal Competition* as a future leader in 2018.

Frank Scherrer
Tel: +41 58 958 58 58 / Email: f.scherrer@wengervieli.ch

Frank Scherrer is specialised in pharmaceutical and healthcare law and competition law. He has many years of experience in advising clients on competition matters and representing them in proceedings before ComCo and the courts. He has written several publications, including his thesis, in competition law.

Urs Weber-Stecher
Tel: +41 58 958 58 58 / Email: u.weber@wengervieli.ch

Urs Weber-Stecher is specialised in international dispute resolution (mainly arbitration) and competition law. He has long-standing experience in advising companies on competition law matters, representing them in proceedings before ComCo and state courts, and handling competition law disputes in arbitral proceedings (as counsel or arbitrator).

Wenger & Vieli Ltd.

Dufourstrasse 56, PO Box, 8034 Zurich, Switzerland / Metallstrasse 9, 6300 Zug, Switzerland
Tel: +41 58 958 58 58 / URL: www.wengervieli.ch

www.globallegalinsights.com

Other titles in the **Global Legal Insights** series include:

- **AI, Machine Learning & Big Data**
- **Banking Regulation**
- **Blockchain & Cryptocurrency Regulation**
- **Bribery & Corruption**
- **Cartels**
- **Commercial Real Estate**
- **Corporate Tax**
- **Employment & Labour Law**
- **Energy**
- **Fintech**
- **Initial Public Offerings**
- **International Arbitration**
- **Litigation & Dispute Resolution**
- **Merger Control**
- **Mergers & Acquisitions**
- **Pricing & Reimbursement**

Strategic partner: